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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning	)	DA 91-577
Regulation of Satellite	)	45-DSS-MISC-93
Earth Stations	)	

REPLY OF DIRECTV, INC. TO OPPOSITIONS TO ITS PETITION FOR RECONSIDERATION AND CLARIFICATION

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I. INTRODUCTION

The Commission recently revised Section 25.104 of its rules, 47 C.F.R. § 25.104, in order to protect "the federal interest in ensuring easy access to satellite-delivered service" and to provide the Commission "with a method of reviewing disputes that will avoid excessive federal involvement in local land-use issues."[1] In response to the *Order*, DIRECTV, Inc. ("DIRECTV"), the nation's leading provider of direct broadcast satellite ("DBS") services, filed a Petition for Reconsideration and Clarification, suggesting modifications to the new rule that would better promote these objectives.[2]

A consortium of Michigan, Illinois and Texas communities ("MIT") has filed a brief opposing DIRECTV's petition,[3] raising arguments directed more to the merit of the

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1 *Preemption of Local Zoning Regulation of Satellite Earth Stations*, FCC 95-180 Report and Order and Further Notice of Proposed Rulemaking (rel. March 11, 1996) (the "*Order*").

2 The Satellite Broadcasting and Communications Association ("SBCA") and Hughes Network Systems, Inc., among others, filed Petitions for Reconsideration, which are also the subject of the Oppositions replied to here.

3 While MIT clearly has directed its Opposition to DIRECTV's Petition, it never served DIRECTV as required by Section 1.429(f) of the Commission's Rules.

Commission's revised rules than to the changes suggested by DIRECTV.[4] While MIT offers little more than conclusory objections that provide little basis for Commission action, both the tenor and substance of its comments demonstrate that the revised rule must be strengthened and clarified.[5]

In its Petition for Reconsideration and Clarification, DIRECTV asked the Commission to implement an irrebuttable presumption in order to protect DBS consumers from the unreasonable burden of defending their installations, or, in the alternative, to exercise its exclusive jurisdiction over satellite services in order to establish a less expensive and more accessible review procedure. DIRECTV also suggested that the revised rule be clarified on three points: (i) that satellite antenna users would not be retroactively liable for ignoring a presumptively preempted local regulation; (ii) that radio frequency radiation is the only satellite antenna health concern subject to local regulation; and (iii) that consumers will not be required to exhaust local remedies before installing DBS antennas

II. CLARIFICATION OF THE RULE IS NECESSARY

The MIT Opposition vividly illustrates that local communities do not yet understand how the revised rule affects their ability to regulate smaller satellite antennas.[6] MIT

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4 Indeed, MIT, which did not file a petition for reconsideration in this proceeding, appears to be attempting to circumvent the Commission's pleading rules by petitioning for reconsideration through its Opposition. *See* Opposition of MIT at 14-18 (Section III, captioned "The Commission Should Reconsider the Preemption Rule"). To the extent that MIT is petitioning for reconsideration, its pleading must be dismissed as untimely. *See* 47 C.F.R. § 1.429(d).

5 The National League of Cities ("NLC") also filed a self-styled "Opposition," but it was nothing more than a one-paragraph pleading incorporating its own Petition for Reconsideration by reference. DIRECTV replies to this Opposition by reference to its Opposition to the NLC Petition for Reconsideration, filed May 21, 1996.

6 "Smaller satellite antennas" refers to those antennas, including DBS antennas, specified in Section 25.104(b)(1).

characterized DIRECTV's requests for clarification as "changes," and insisted that antenna users be immediately liable for noncompliance with presumptively preempted local ordinances.

The MIT Opposition shows that several important policies announced in the *Order* are not clearly articulated in the rule itself. The Commission should therefore clarify its rule to: (i) include a statement that no antenna user will be liable retroactively for failing to follow a presumptively preempted ordinance; (ii) eliminate the confusing reference to local "health" regulation; and (iii) make clear that users of smaller satellite antennas, including DBS dishes, are not required to exhaust local remedies. Without clear guidance in the text of the rule itself, local officials will continue to misread and misapply the Commission's preemption policies.

A. Local Communities Do Not Understand Presumptive Preemption

The Opposition of MIT is perhaps the best evidence that the requested clarifications are necessary. MIT completely miscomprehends the principle of presumptive preemption adopted in Section 25.104(b), arguing that the Commission should "reject the suggested change to the rule" that would allow an antenna user to "operate illegally" if he did not comply with a presumptively preempted ordinance.[7] MIT also suggests that antenna users should be not just retroactively liable, but *immediately* liable for installing an antenna consistent with Section 25.104(b)(1).[8] If an organization consisting of many municipalities cannot understand the principle of presumptive preemption when it deliberates these questions in a pleading -- MIT describes this principle as "entirely foreign to our system of law" -- then individual local regulators will likely have similar difficulty with the concept when attempting to enforce their own ordinances. Viewed less charitably, the absence of definitive clarification by the Commission may

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[7] MIT Opposition at 9.

[8] *Id.*

lead to "creative" interpretation of these provisions consistent with that demonstrated in the MIT Opposition.

While the revised rule may be unclear, the Commission's policy is not. The Commission stated unambiguously in the *Order* that "users should be free to install antennas covered by the presumption without first proving the unreasonableness of the local requirement,"[9] and that "consumers are not liable for any penalties that may accrue for noncompliance with a regulation during the pendency of any case brought for determination of the reasonableness of that regulation."[10] But local regulators will not read the *Order*; they will examine, at most, the rule, and the rule itself evidently does not convey the same message in a sufficiently forceful manner.

Section 25.104 must therefore be clarified, as its success will depend in large part upon whether local officials understand its import. If DBS consumers are harassed by local regulators who find presumptive preemption "foreign," then they will turn to other technologies that leave them free from local regulatory interference, and the policies of both Congress and the Commission will be defeated DIRECTV therefore reiterates its request that the Commission amend its rule to clarify that local regulators may not enforce satellite antenna regulations affecting DBS dishes unless they have first rebutted the presumption of preemption, and that antenna users will not be retroactively liable for noncompliance.[11]

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9 *Order* at ¶ 31.

10 *Id.* at n.68.

11 *See* Petition of DIRECTV at 12-15.

B. There is No Legitimate Local Health Regulation of DBS Antennas

In its Petition, DIRECTV also urged the Commission to clarify that there is no legitimate local health regulation of DBS antennas. As discussed in the *Order*, the only health concern ever raised in this proceeding is the effect of radio frequency radiation from transmitting antennas, an issue that is inapplicable to receive-only DBS dishes.[12] MIT opposes this request, and instead asks the Commission to allow local regulators to consider certain unarticulated health concerns when promulgating satellite antenna ordinances

The Commission should eliminate the reference to local health regulation in Section 25.104, and replace it with a reference to radio frequency radiation regulation, which is the only local health regulation of satellite antennas the Commission has explicitly recognized Local health regulation of DBS antennas is not necessary Neither MIT nor any other party has identified *any* health concerns presented by DBS antennas; MIT instead asks that local officials be allowed to promulgate health regulations because, it hypothesizes, "science may discover legitimate local health concerns in the future."[13] Were such concerns to arise, however, they should and would be regulated on a national, not local level, as they would not differ from jurisdiction to jurisdiction.[14] Allowing the reference to local health regulation to remain in Section

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12 *Order* at ¶ 52.

13 MIT Opposition at 8.

14 MIT's analogy to lead paint is instructive. Opposition at 8. As MIT concedes, lead paint is a "major *national* health problem." *Id.* (emphasis supplied). Indeed, lead paint, which presents the same problems whether in Tacoma or Tuscaloosa, was banned by the *federal* government, which preempted state lead paint regulation. Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. § 4846 ("It is hereby expressly declared that it is the intent of the Congress to supersede any and all laws of the States and units of local government insofar as they may now or hereafter provide for a requirement, prohibition, or standard relating to the lead content in paints . . .").

25.104 is an open invitation to local officials to adopt health standards based upon either highly speculative or nonexistent "scientific" evidence.

III. THE COMMISSION SHOULD ASSERT EXCLUSIVE JURISDICTION

MIT opposes the recommendation of DIRECTV and other petitioners that the Commission assert its exclusive jurisdiction over satellite services and provide initial review of all disputes pursuant to Section 25.104. MIT unfairly mischaracterizes these suggestions as an attempt "to convince the Commission that State and Federal courts cannot be trusted to apply that law and that only the Commission can make fair and impartial decisions."[15]

MIT's only asserted reason for opposing initial Commission review of disputes under Section 25.104 is its complaint that "all who disagree with the satellite industry will be required to go to Washington, D.C. to resolve any disputes."[16] MIT is clearly unfamiliar with the review procedures already adopted by the Commission.[17] No one will be required to "go to Washington"; Commission review will, in fact, be less expensive and more accessible than state or federal court litigation. Exclusive jurisdiction is also critical from the Commission's point of view, as initial state or federal court review of disputes pursuant to Section 25.104 will, according to the holding of *FCC v. Town of Deerfield*,[18] preclude the Commission from interpreting its own regulation.

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15 MIT Opposition at 4.

16 *Id.*

17 *Procedures for Filing Petitions for Declaratory Relief of Local Zoning Regulations and for Waivers of Section 25.104.* Report No. SPB-41 (rel. April 17, 1996) ("Petition Procedures Notice"). DIRECTV urges the Commission to adopt similar procedures to allow a municipality to rebut the presumption of preemption pursuant to Section 25.104(b)(2).

18 992 F.2d 420, 428-29 (2d Cir. 1992).

There are four primary reasons why the Commission should assert its exclusive jurisdiction over direct-to-home satellite services granted in Section 205 of the Telecommunications Act of 1996.[19] First, it will be far less expensive for all parties to resolve disputes at the Commission than in a state or federal court.[20] FCC review of disputes under Section 25.104 will not involve personal appearances, as would be required by any court, but will be decided on the basis of pleadings only. Moreover, Commission review of disputes under Section 25.104 would not employ the complex procedural rules typical of court litigation. There would be no discovery, no motions, and no hearings before the Commission, nor would either party be required to hire an attorney.[21]

Second, the Commission's notice procedures will allow all interested parties to participate in the proceedings. The procedures adopted by the Commission for reviewing disputes pursuant to Section 25.104(a) and waiver requests pursuant to Section 25.104(e) permit public comment both in opposition to and support of the petitions.[22] The parties to the dispute will be notified directly by mail after the petitions have been placed on public notice.[23] Court rules

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19 Codified at 47 U.S.C. §303.

20 The municipalities have attempted throughout this proceeding to paint themselves as penniless and beleaguered, unable to absorb the allegedly high cost of defending their ordinances. In truth, municipalities will be much better able to afford to litigate a dispute under Section 25.104 than a typical DBS consumer

21 MIT is simply incorrect that a municipality would be required to hire outside counsel to participate in Commission proceedings. Opposition of MIT at 12. Many courts, on the other hand, do not allow corporations or municipalities to appear without counsel.

22 *See* Petitions Procedure Notice.

23 DIRECTV does not oppose MIT's suggestion that these public notices be published in the Federal Register, nor would it oppose a longer response period as long as the antenna user would not face any retroactive liability. *See* Opposition of MIT at 12-13. DIRECTV does, however, strongly disagree with MIT's unfounded allegation that the time periods suggested by SBCA are "an attempt to deny participation by the municipalities." *Id.*

do not employ similar notice procedures, nor is the public invited to participate in court proceedings.

Third, exclusive FCC jurisdiction should reduce the overall amount of litigation under Section 25.104. Disputes under Section 25.104 will inevitably involve the same sorts of local ordinances and restrictions, and the Commission be able to use its expertise to quickly develop precedent that will be binding upon and give guidance to parties across the nation. Court review, on the other hand, will not offer these benefits A local judge in Alabama will not be bound by, and will likely not even have the benefit of another court's decision in Oregon. Neither the DBS consumer nor the municipality will be guided by decisions in far flung areas of the country, and the same types of disputes will be reviewed anew by countless local courts unfamiliar with the Commission's preemption rule

Fourth, initial judicial review will completely undermine the Commission's stated objective for this rulemaking proceeding: to permit it "to interpret [its] preemption rule prior to *any* judicial review."[24] As its stands, Section 25.104(b) allows municipalities the right to choose the forum in which to rebut the presumption of preemption, and, given the hostility they have demonstrated toward Commission review of local satellite antenna zoning ordinances, they will inevitably choose to litigate in their local courts As the Commission knows well, once a court has rendered its judgment, the Commission will be unable to review the dispute. Unless it asserts exclusive jurisdiction over Section 25.104, the Commission should expect that only in the most rare cases will it be able to interpret its own preemption rule.

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[24] *See Preemption of Local Zoning Regulation of Satellite Earth Stations*, 10 F.C.C. Rcd. 6982, 6983 (1995) (NPRM) (the *"Notice"*) (emphasis supplied).

IV. CONCLUSION

The Commission has significantly improved its old preemption rule, but the MIT Opposition demonstrates that local officials still do not understand the revised rule. The need is urgent for the Commission to clarify the revised rule in order to ensure that local jurisdiction do not enforce their satellite antenna regulations unless and until they have rebutted the presumption of preemption. The Commission should also assert exclusive jurisdiction over initial review of disputes under Section 24.104, or else it will be unable to interpret its own rule -- the very inability that led the Commission to commence this rulemaking.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have, this 31st day of May, served by United States mail, postage prepaid, Reply of DIRECTV, Inc. to Oppositions to Its Petition for Reconsideration and Clarification, to the following:

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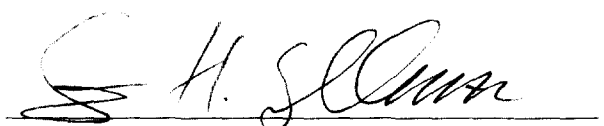

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